

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF OREGON
3 UNITED STATES OF AMERICA,)
4 Plaintiff,) No. 05-60008-2-HO
5 v.) November 12, 2008
6 PIROUZ SEDAGHATY, et al.,) Eugene, Oregon
7 Defendants.)
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10 TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE MICHAEL R. HOGAN
12 UNITED STATES DISTRICT COURT JUDGE
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1 (Wednesday, November 12, 2008; 12:34 p.m.)

PROCEEDINGS

3 THE CLERK: This is the time set for Case No.
4 05-60008-2-HO, United States of America versus Pirouz
5 Sedaghaty, status conference and oral argument on
6 defendant's first motion No. 53 for discovery;
7 defendant's supplemental motion No. 90 for discovery;
8 government's motion No. 101 for reciprocal discovery;
9 defendant's renewed motion No. 135 for modification of
10 the court's order of 5/16/08 and motion to access
11 classified material; defendant's motion No. 137
12 regarding defense access to classified material.

13 THE COURT: Counsel, good morning.

14 MR. MATASAR: Good morning.

15 THE COURT: Or close to it. I'll make a couple
16 of comments that might shorten our efforts or not. You
17 probably can get now that I'm going to be proceeding on
18 a rather deliberate basis on some of the materials that
19 the attorneys are interested in, and especially here
20 when I've got the Ninth Circuit speaking about the very
21 material we're talking about.

22 I will tell you that in -- you know, part of
23 one of these processes is undeniably the education of
24 the judge who's not used to handling these everyday, but
25 I like the discussion in the *Libby* case. And to me it

1 provides a pretty good balance here. There was a
2 factual difference there. We had a defendant who was a
3 national -- former national security official. And I
4 think there is a factual difference which makes a
5 difference.

6 I have thought about -- as you know, in a
7 criminal case, there is some rights that attach that
8 aren't there on a civil case, I completely understand
9 that. And I've thought about whether or not I should
10 ask -- well, I'm going to do this, I don't have to think
11 about this, I'm going ask for guidance from the parties
12 on how to proceed in a manner that allows some
13 participation of the defendant, at least in an ex parte
14 manner, concerning the defense theory or the possible
15 theory behind a motion to suppress or dismissal.

16 And I note that the government has a brief now
17 that's been submitted and some materials. I haven't
18 reviewed them. I've been in court all morning. I
19 understood some of them may or may not be coming to
20 Eugene today, so that's -- I haven't been in the same
21 town as them so far, I guess. I will be soon. And I'm
22 going to review those before I do anything, frankly, but
23 I'm -- I hope we've made progress on the nonsecured
24 discovery items. We'll talk about those to the extent
25 we need to today.

1 But I am quite chary about getting the cart
2 before the horse here. And although there apparently
3 was material that was mistakenly got into the public
4 realm, the Ninth Circuit has some pretty strong language
5 that any memory of the contents of the sealed document,
6 even well-reasoned speculation as to the contents, bar
7 disclosure. And it's barred from discussion until -- it
8 may have been mistakenly released, but not to me. And
9 I'm going to look at it first.

10 So with those things in mind, at least you know
11 what to try to convince me of or unconvince me of,
12 right?

13 MR. MATASAR: Your Honor, I think our
14 discussions might go a little bit better if you gave us
15 a few minutes to talk among ourselves.

16 THE COURT: Yes, wonderful, happy to.

17 (Discussion held off the record.)

18 MR. MATASAR: Your Honor, as a guide for the
19 proceedings here, let me just tell you how we had
20 divided up the case on the defense side and just ask the
21 court how you want to proceed.

22 We have essentially three issues that we have
23 discussed. One of which is the nonclassified discovery.
24 One is the motions and such involving the classified
25 discovery. And the third is the order that the court

1 issued about the secret document in which you indicated
2 that there would be no discussion even among the defense
3 team about that document. So that's just the ways we've
4 analyzed.

5 THE COURT: Take the first topic last, please.

6 MR. MATASAR: The last topic last or the
7 first -- the first topic was nonclassified discovery.

8 THE COURT: Let's take that at the end.

9 MR. MATASAR: Okay. So why don't I take -- the
10 first two are Mr. Wax's. I'll just talk about the third
11 one, if I can, the document and the order saying we
12 can't talk about it.

13 One thing, Your Honor, that I -- while I don't
14 have the case with me, my reading of the Ninth Circuit's
15 opinion on the secret document case that came down I
16 think in August was not that nobody could discuss it,
17 but only that it couldn't be used to establish standing
18 to file a civil lawsuit.

19 My -- and the court was very concerned about
20 that issue, but during the litigation process of that
21 case, and Erin Hogarty is here. She would know better
22 than anyone --

23 THE COURT: We don't get to cite her in court
24 however.

25 MR. MATASAR: That's fine. My understanding of

1 that case is simply that they couldn't use it to
2 establish standing, not that the lawyers were not
3 allowed to talk about the document or to prepare legal
4 documents to mention it in general, although they didn't
5 talk about the substance of it. But I couldn't see
6 anything in the opinion that indicated the lawyers were
7 not allowed to talk about it, or even with the client,
8 only that it couldn't establish standing.

9 THE COURT: There is this language: "We are
10 satisfied that the basis for the, quote, state secret,
11 end quote, privilege is exceptionally well documented.
12 Detailed statements underscore that disclosure of
13 information concerning the sealed document and the
14 means, sources, and methods of intelligence gathering in
15 the context of this case would undermine the
16 government's intelligence capabilities and compromise
17 national security."

18 And then, without quoting further, our friends
19 upstairs found that any memory of contents of the
20 document, even well-reasoned speculation, is barred from
21 disclosure. And I don't see any point -- I don't see
22 any advantage to your client, and if there is some you
23 don't feel you can tell me about because of strategy,
24 then I'll devise a way for you to inform me of that.
25 But I don't see any necessity for it to be discussed

1 until I see the document.

2 And then we have a -- you know, if, after -- if
3 and when I determine that it should be disclosed to your
4 client's constitutional interests, and the government
5 refuses, then the court can fashion a remedy that
6 applies a lot of protections, including the Jencks Act,
7 FISA, Sixth Amendment, Fourth Amendment, et cetera.
8 Those things are all in play here.

9 And it could be -- it could be that this is the
10 rare FISA case in which knowledge of purported
11 surveillance activities must be disclosed to a defendant
12 as an aggrieved person, but I don't know that yet.

13 MR. MATASAR: First, Your Honor, let me say is
14 if what you're saying is you want to see it before you
15 rule, we have -- there is no rush here. We're fine with
16 that.

17 THE COURT: Okay. See, if you were -- you were
18 not, but if you were a part of the discussions in my
19 chambers, we have come up with all sorts of speculative
20 scenarios, but, of course, we don't have any facts to
21 base anything on. And we have to look at things first.
22 It's a fun discussion, but that's about it.

23 MR. MATASAR: Remember, Your Honor, though that
24 in this case, unlike all the others, I have seen the
25 document, as has the defendant. So we're in a little

1 different situation, but I --

2 THE COURT: It's different. But having seen
3 it, it's not enough. I don't think that makes this the
4 same as the *Libby* case where there was a national
5 security issue. To me, there is a difference there,
6 despite the fact that your client may have seen it. And
7 if so, frankly, I don't -- on this record, I don't even
8 know that except for your statement or even your
9 statement that you've seen it except for your statement.

10 We can make a record.

11 MR. MATASAR: No, I tried not to do it with my
12 statement. What I tried to do was cite the discussion
13 of the case in the Ninth Circuit opinion in which they
14 said that --

15 THE COURT: Okay.

16 MR. MATASAR: -- the lawyer who got the
17 document by mistake sent it to the other lawyers in the
18 case, and then I said I was one of the other lawyers in
19 the case. So I don't mean to say that I saw it or not.
20 As far as the defendant, what I did was -- I think I
21 quoted from the Ninth Circuit opinion which said that
22 the other directors were given a copy, and I said that
23 he was another director. So I have not made such
24 specific statements.

25 THE COURT: Even though I sometimes grumble, I

1 really try to do what the Ninth Circuit says. It's a
2 pretty good system overall.

3 MR. MATASAR: And we try to do what you say,
4 Your Honor. That's how it works. So let me have --

5 (Discussion held off the record.)

6 MR. MATASAR: Your Honor, you've indicated
7 awareness of all of the main issues that we have raised,
8 especially the civil versus criminal, the flat out
9 language in the Supreme Court --

10 THE COURT: I tried to be prepared.

11 MR. MATASAR: In a criminal case --

12 THE COURT: I know that the big names are
13 coming to town.

14 MR. MATASAR: In this case, even though it's a
15 privilege to bore you with a defendant's right to
16 present a defense, I know -- you've indicated you have
17 that, and I think we'll just await further communication
18 from the court.

19 We'd like to know -- once you look at it, we'd
20 like to have one more chance after you've looked at the
21 material, to have a full and frank argument about the
22 decision before you make it.

23 THE COURT: I want to hear whether -- from both
24 of you what you think about the defense giving me an ex
25 parte brief, sort of what you want me to look for at --

1 with regard to the theory of your defense or theory of
2 certain motions, that sort of thing. I'd like to know
3 about that. I'd like to have the government's view on
4 that. You know, I -- frankly, I don't know this, but I
5 probably won't understand a lot of what I review until I
6 look at the government's brief. I don't know, though,
7 because I haven't seen it. So, you know, the --

8 MR. MATASAR: We'd like to do that.

9 THE COURT: I think that is an opening that I'm
10 possibly giving you. We'll see what the government
11 thinks about it. But, you know, it's not -- you need to
12 educate your judge.

13 MR. MATASAR: I agree, Your Honor. And in the
14 typical case, of course, we're not needing to disclose
15 our strategy and internal theories to the government or
16 to the court, but in this case we understand why it's
17 appropriate. And the court is going to make an in
18 camera inspection. And Mr. Wax -- maybe I'll let him
19 explain why that's the case, but, yes, we would like the
20 opportunity to give you an ex parte -- some ex parte
21 material that will explain why we need certain things.

22 THE COURT: Well, after 36 years in this chair,
23 I already know what your theories are in the drug cases,
24 or you name it.

25 MR. MATASAR: Right. It was planted. It was

1 somebody else's. It wasn't drugs. Yes, I'm sure.

2 THE COURT: You haven't had a new one for a
3 while on some of those cases. Okay.

4 MR. WAX: Judge, in terms of the government
5 brief that you mentioned, and the suggestion of an ex
6 parte filing from us, are you thinking about that in
7 terms of the classified document, or are you thinking of
8 it in terms of the submission that the government made
9 on September 5?

10 THE COURT: The submission the government made
11 on September 5.

12 MR. WAX: Okay.

13 THE COURT: Is it September 5 it was made?

14 MR. GORDER: Yes, Your Honor.

15 THE COURT: Yes. All right.

16 MR. WAX: We would be happy to provide the
17 court with an ex parte filing. In the pleading that we
18 submitted on October 10th, I believe we indicated that
19 that was one of the things that had happened in some of
20 the other cases that were cited.

21 THE COURT: I couldn't find that in opinions --
22 in other opinions. I know it was there. We had a
23 discussion in chambers about that today, that, you know,
24 do you know of another case where a judge actually did
25 that? You know, Congress didn't give us a lot of clear

1 guidelines on how to handle this balance between a
2 defendant -- a criminal defendant's rights, and they're
3 significant, and the government's important
4 considerations also, which are also significant. So
5 sometimes things get compromised. But there are certain
6 things that we're going to see preserved.

7 What is the government's position on the
8 defense giving me something ex parte basically
9 describing what their theories are so that I can be more
10 sensitive to them than perhaps I wouldn't be otherwise?

11 MR. GORDER: Your Honor, I guess I'd like to
12 break this down into two separate areas, the document
13 that the defendant has lodged with the court and then
14 the material that we have filed on September 5th.

15 THE COURT: Yes.

16 MR. GORDER: With regard to the document the
17 defendant has lodged with the court, I have not seen it,
18 nor has Mr. Cardani. And so we're kind of -- I mean,
19 this is a very unusual situation.

20 THE COURT: When I'm talking about input now is
21 not that document.

22 MR. GORDER: Okay.

23 THE COURT: I'm talking about material that you
24 or someone up the line filed.

25 MR. GORDER: Okay. With regard to that, our

1 position would be that I think you should read the
2 material that we have filed first, and then give us the
3 opportunity to brief whether or not there should be an
4 ex parte submission of the theory of the defense with
5 regard to that.

6 I'm not saying that we would object to that
7 with regard to our material, but I think that's
8 something that we might want to --

9 THE COURT: It may not be quite fair for me
10 just to pop it on you, so I'm not going to necessarily
11 read the material first. I might. But I am not going
12 to bind myself to that. If you want a little time to
13 file a brief about that, that's fine with me. I can --
14 you know, I haven't read every case. I've read the ones
15 I have wanted to see. And I didn't see one that
16 discussed that. But it just seems to make some sense to
17 me, frankly.

18 MR. GORDER: And I would say that at least my
19 experience -- and it's pretty limited, frankly, in this
20 area, too -- the courts have generally at least taken a
21 look at the government's CIPA filings first before --

22 THE COURT: Sure.

23 MR. GORDER: -- making any other accommodations
24 along that line.

25 With regard to the document they've submitted,

1 and this somehow I'll have to discuss with other folks
2 in Washington.

3 THE COURT: Sure.

4 MR. GORDER: It would seem to me that it might
5 be appropriate in that context to have a lawyer for the
6 government participate in that hearing with them so
7 that, you know, whatever this motion to suppress is
8 could be argued by both sides.

9 It would not be Mr. Cardani or myself, because
10 we don't have access to the document and don't expect
11 ever to. But I would like, I guess, the opportunity to
12 at least brief the former, which is --

13 THE COURT: How long do you want to file
14 something on that? Frankly, my -- this is more gut
15 reaction on my part, frankly, you know, I'm tempered by
16 a lot of scar tissue, but not so much in this area.
17 Where do we -- that's what it is. But if you want a
18 certain amount of time to give me a brief saying "you
19 can't do that, Judge," then I'd be happy to give you the
20 chance.

21 MR. GORDER: Or we agree that they can do that.

22 THE COURT: Yeah.

23 MR. GORDER: Two weeks I think would be
24 sufficient.

25 THE COURT: All right. Why don't you do that,

1 if you want to file something, you can.

2 And, Mr. Wax, I don't require it. I'm not
3 really basing this on a case telling me to do it.
4 I'm -- it just made some sense to me, you know, as --
5 well, all we've done so far in our chambers is play 20
6 questions, you know. And so what do you -- frankly, the
7 theories we've come up with are not all that
8 sophisticated. Just trying to make sure these statutes
9 apply as they were intended. And I think for that
10 Section 4 analysis, that happens after a court
11 determines what a document may appropriately be
12 considered. So that's -- okay.

13 Where do we need to go from there today?

14 MR. WAX: Judge, with respect to the classified
15 discovery issues, in the pleading that we filed, we
16 tried to make the point that we believe that the
17 government should be required to provide us with some
18 sense of what they have filed so that we can
19 meaningfully participate in the process.

20 All that happened on September 5 was we
21 received three one-paragraph notices that something had
22 been filed. And it seems to me that you have, under
23 CIPA and under the case law which has discussed it, the
24 discretion to require the government to first explain to
25 you why the material should be considered classified.

1 Second, the material is, as we understand it,
2 presumptively material that should be provided to us.
3 And that you review under the CIPA is to determine not
4 whether we should get it, but in what form we should get
5 it. Whether we should receive something that's redacted
6 or something that's substituted or things of that
7 nature. And the process, I think, can include defense
8 participation in that, particularly since I have, and
9 Mr. Matasar will have because he's been approved for,
10 security clearance at this stage. So we're feeling
11 particularly handicapped right now.

12 THE COURT: The next question is need to know,
13 however. And I realize you both have been approved.
14 And that -- you know, the government is going to have to
15 agree there is a need to know, or I'll determine it.
16 But, yes, I do think you are getting the cart before the
17 horse on this argument you are making.

18 MR. WAX: It seems to us in terms of need to
19 know, the government has already made the determination
20 by filing material with the court in response to a
21 discovery request that it is discoverable. And that
22 there is, therefore, a need to know at least in some
23 form.

24 THE COURT: Well, I will say that there -- you
25 can argue that the government agrees that these

1 materials are discoverable because they were submitted
2 for in camera review. That's a fair argument. And I'd
3 like to have the government's response to that. But it
4 could be that they are discoverable, as you say, as
5 summaries, redactions, that sort of thing, don't you
6 think the court needs to take care of that first if
7 that's the case?

8 MR. WAX: There is no question the court needs
9 to take care of that. I think that in terms of allowing
10 meaningful defense participation, the government can, at
11 this stage, provide something to us that is not
12 classified, that says, at least in general, what the
13 material is that they provided to the court.

14 For example, they could say that they have
15 provided, you know, statements of the defendant. That
16 wouldn't be classified. And that statement in and of
17 itself wouldn't be classified. Where those statements
18 came from, might be.

19 They could say we have, you know, provided to
20 the court reports of search activity. Again, that is
21 not a classified statement. But, again, it would enable
22 us to have some meaningful input on whether or not this
23 stuff should be given to us in any more complete or
24 specific --

25 THE COURT: I am listening carefully. And I --

1 you know, I don't want to speculate. Let's assume, it's
2 not based on anything except more than possibilities,
3 let's assume the government got more than they should
4 have got without going to the FISA court. It could be a
5 basis for a motion. I get it. We're ahead of that. If
6 that is a theory you are going to have and facts justify
7 it, and as you know, you can get some things, and then
8 you got to get to the court and so on, okay, I'll go see
9 Judge Leavy and get expert advice on that, but I think
10 we're ahead of that game.

11 MR. WAX: Let me throw out one other thought,
12 please, and that relates to the declaration that we
13 provided to you from Colonel Lang. One of our biggest
14 concerns here is that the government has not provided to
15 you everything that they're required to provide. That
16 is a paramount concern that we have in this case and
17 with respect to whatever review process you are going
18 through.

19 You have available to you at this point Colonel
20 Lang's declaration that tries to give some definition of
21 the landscape of material that you should have available
22 to you to review. The track record of the government in
23 other cases over the past seven years, and in this
24 instance I'm using the government generically, not
25 specifically related to the Assistant U.S. Attorneys in

1 this district.

2 THE COURT: Of course not. Mr. Cardani is
3 getting a big promotion.

4 MR. CARDANI: Am I now a mid-level bureaucrat?

5 THE COURT: Yes.

6 MR. CARDANI: I've arrived in life.

7 MR. WAX: The track record isn't that good.

8 And we're very concerned that what you have may --

9 THE COURT: That's a fun argument to make,
10 but -- but you don't expect me to operate based on that.
11 We're going to find out what is here. If -- frankly,
12 they've got a hard oar to pull to convince me not to let
13 you give me something ex parte that sets up some
14 theories here. They may get there. But, you know, you
15 are going to have a chance to tell me why they are
16 withholding stuff.

17 I'll talk to you a little later, Erin. Erin,
18 if you want to come up and sit with David, that's the
19 way to communicate with me in court, you can do that.

20 MR. WAX: I don't have anything else to add at
21 this point.

22 THE COURT: So anything else on these issues?

23 How about the non -- the motions that have been
24 around awhile where you're seeking other discovery, and
25 there is a motion for reciprocal discovery and so on,

1 and there is a pile of stuff, I assume, for
2 nonclassified material, I assume that these lawyers can
3 make progress on that, the ones in front of me.

4 MR. CARDANI: Judge, I think since we met last
5 we have split the cost with the defense and made digital
6 copies through a company in Portland of a voluminous
7 amount of material, bank records, all of the evidence
8 that came out of the search warrants, I believe.

9 The stuff that was in the Eugene discovery room
10 was transported up to Portland. And at some expense was
11 digitized and provided to the defense. It's a huge
12 amount of material. That's been done.

13 Since we've last met, we've also supplemented
14 our nonclassified discovery submissions. I believe this
15 was batch number five that we turned over to Mr. Wax and
16 Mr. Matasar.

17 So there has been a huge amount of material
18 turned over, although there is some that has not. And
19 we still have some disagreements. And we filed early on
20 a government's response to the defendant's first motion
21 for discovery and supplement thereto. And in that, we
22 did -- as the court knows, in this district, discovery
23 is oftentimes quite open. We just open up our files to
24 almost everything. It prevents things like this. It
25 facilitates plea discussions. There is all kinds of

1 good reasons for it. But there are also good reasons
2 why it can't be the case in this case. And the court is
3 aware of that. So we're doing our best.

4 THE COURT: Could you do something to narrow
5 the dispute down so I know what you want me to decide?

6 MR. CARDANI: Sure, sure, I can give you a
7 couple of examples where we're having some fundamental
8 disagreements with the defense.

9 They are claiming that if we have any
10 information whatsoever that Mr. Sedaghaty did something
11 that was not criminal, and I'm exaggerating, but only
12 slightly, I think, that if we have any evidence that he
13 was not violating the law at any given point in time,
14 that that is discoverable as exculpatory. And we
15 disagree with that. We cited cases in that brief that I
16 just referenced why we believe that's not the case.
17 That's one big area.

18 Another big area is we got a series of hard
19 drives from the search warrant that we did way back when
20 down in Ashland. We have turned over copies of those
21 hard drives. And they are huge amounts of material.
22 The paper that would be produced from that would
23 probably cover half of this courtroom. We turned over
24 those hard drives to the defense. They have at their
25 beck and call an ability to resurrect anything in here

1 that they want.

2 As I understand some of their pleadings, they
3 want us to go further than that and give them any kind
4 of e-mail traffic that came out of those computers and
5 things of the like. We don't think we need to do that.
6 We have given them the material itself. And what they
7 may want as exculpatory or what is helpful for the
8 defense from within those computers, they can get.

9 Now, we've gone beyond that and we've flagged
10 certain items that we will be using at trial. We'll
11 print that out for them. We'll give them an expert
12 report when it's made.

13 That's another area in some contention. They
14 want expert reports on some of the forensic computer,
15 that hasn't been done yet. We're still examining it.
16 Mr. Seda was out of the country for four years. The
17 investigation, to some extent, went dormant. Was
18 resurrected when Mr. Seda came back to the United
19 States. So we're continuing to look into the computers.

20 We are in the process of heading towards doing
21 a forensic report, an expert report, on the computers.
22 We will give them, from that, hard copies of anything
23 that we intend to use at trial. We will flag some
24 information that may be exculpatory.

25 But the large point is, is they have the

1 computers. They can do exactly what we are doing. And
2 that is analyze it. So that's another big area, I
3 think, that we have some fundamental disagreement on.

4 Mr. Wax may have some other items. But I think
5 that we need some balls and strikes called by the court
6 to help us on those issues because I think we're right
7 on the law. We've given them an awful lot of material.

8 And I think that the court's reading of the
9 material that's been filed on September 5, although it's
10 on the other side of the house, is also going to give
11 the court a lot of confidence. When the court does the
12 heavy lifting, and I think there's going to be some
13 heavy lifting, there is an awful lot of material that
14 will provide the court some context on this whole thing.
15 I think potential defenses, even from the government's
16 standpoint, will be somewhat fleshed out. And I think
17 the court will be in a better position to make calls on
18 both sides of the house after it's done the reading in
19 the briefs that are waiting for the court.

20 THE COURT: Okay. Is this yours, Steve?

21 MR. WAX: It is, thank you.

22 THE COURT: Okay.

23 MR. WAX: With respect to the computers, there
24 is no question that we have in hand mirrors of the hard
25 drives. The problem that we have is that the material

1 on those hard drives is not something you can just put
2 it into a box, hit a button, and it all comes out. It
3 is an incredibly expensive and time-consuming process to
4 recover data from these machines. As we all know in a
5 lay sense and I've been learning more than I care to
6 know in a more expert sense, you try to delete something
7 from the machine, it's not deleted, and it's scattered
8 all over creation.

9 As we understand the case and as we have
10 attempted to articulate to the government, on those hard
11 drives there should be a wealth of the accounting
12 information and a wealth of e-mail information, which,
13 from what we have seen, we believe will be primarily, if
14 not entirely, exculpatory.

15 THE COURT: Do you want -- are you exercising
16 that you want them to do it instead of you?

17 MR. WAX: We believe they've done it. Given
18 the amount of time and effort that has been put into
19 this case, what we're -- our understanding is, and our
20 belief is, and if this is wrong, I'm certainly prepared
21 to be corrected on this, if they have printouts of those
22 e-mails, if they have a printout of the QuickBooks files
23 that they have recovered from the computers, then it
24 seems -- rather than putting us to the time and expense
25 of attempting to duplicate that effort, they should

1 provide it to us.

2 We believe that most of it is going to be
3 exculpatory so that there would be a double obligation.
4 Those statements that are statements of the client that
5 they have managed to recover, we're entitled to
6 statements of our client.

7 My understanding of the reality of forensic
8 work is that the government has available to it certain
9 tools that we're not going to have available. And to
10 the extent that their computer experts are able to
11 recover things in a way that a person we could hire
12 cannot, it seems as though, again, it's just
13 fundamentally fair, if they've done it, this is the
14 client's material, give it to us.

15 THE COURT: Why could they do it better than
16 you could? Have you ever had your computer hard drive
17 crash? I have. I've been charged with the
18 responsibility of getting all the vacation photos off a
19 crashed hard drive.

20 MR. WAX: Well, we're, unfortunately, looking
21 at hard drives that are -- some of them, you know, we're
22 looking for information from the year 2000.

23 THE COURT: Yeah.

24 MR. WAX: And through however many iterations
25 of the QuickBooks program, however many iterations of

1 erasures and non-erasures, and our government agencies,
2 as we understand it, from speaking with our experts,
3 have more tools at their disposal than we're likely to
4 have.

5 THE COURT: Okay.

6 MR. WAX: And if they've done it, why not give
7 it to us? It's part of --

8 THE COURT: Is this the basic dispute? Do you
9 agree, Mr. Cardani?

10 MR. CARDANI: I think it's a dispute.

11 THE COURT: All right. Well, tell me what
12 other basic disputes there are.

13 MR. WAX: All right. Next basic dispute --

14 THE COURT: I understand this one. I'll give
15 you something.

16 MR. WAX: The next basic dispute runs
17 throughout many of the issues that I flagged in the
18 pleading I filed that I labeled discovery matters in
19 dispute to try to give a guide. And that has to do with
20 what is or is not exculpatory in this case.

21 The allegations here in their essentially
22 normal tax context require the government to prove
23 willfulness and intent. The government has said they
24 don't have a smoking gun. They don't have a statement
25 anywhere that has Mr. Sedaghaty saying "I want this

1 money to be hidden, and I want this money to go to
2 purposes that aren't consistent with the charitable
3 purposes of al-Haramain U.S.A." So they've told us that
4 they are going to attempt to prove those mental state
5 elements through circumstantial evidence.

6 In putting together a defense in that kind of
7 situation, we believe, and we have provided the court
8 law that we believe supports this position, we are
9 entitled to show his intent by not only acts that were
10 committed on October 3rd of 2001 when he signed the
11 return, but other acts that are relevant to the question
12 of his intent on the very subject matter of this
13 indictment; that is whether or not he was attempting to
14 do something with a tax return in order to disguise the
15 fact that he was, as the government alleges, trying to
16 get money to some Chechens who were going to use it for
17 guns.

18 We believe that if he testifies, he is
19 permitted to talk about his intent. And in talking
20 about his intent, he is going to be permitted to talk
21 about his life history of activities of the peaceful and
22 non-terroristic nature. We believe we're entitled to
23 call character witnesses. And character witnesses we
24 could call would be permitted to testify to his
25 character or peacefulness, if you will. "I knew the guy

1 in 1990 and I knew the guy in 2003."

2 THE COURT: Why isn't that -- why can't you dig
3 those people up instead of having the government do it
4 for you?

5 MR. WAX: Well, we certainly are doing whatever
6 we can, but we know from the discovery that's been
7 provided, that the FBI had contact with Mr. Sedaghaty as
8 early as September 15 of 2001. We know from the
9 discovery that's been provided that the government was
10 speaking with other people in southern Oregon, Muslims
11 in southern Oregon, Muslims who attended the prayer
12 services at the Ashland prayer house where Mr. Sedaghaty
13 was engaged. The government will not give us the
14 reports of those conversations. If they have spoken
15 with people who attended the services in the prayer
16 house, and those people did not say to the government,
17 "oh, yeah, Mr. Sedaghaty, he's talked about raising
18 money to send to the Chechen rebels." If those people
19 said to the government, "Mr. Sedaghaty is a peace-loving
20 guy. Mr. Sedaghaty is trying to provide food stuffs to
21 refugees." And those are in reports that the government
22 has, that's exculpatory. And that's where we have a
23 fundamental disagreement about what is exculpatory.

24 And I don't think that if it's agreed that what
25 I'm saying is exculpatory that there is any question but

1 that the law requires them to give that to us. Sure,
2 we're looking for people, but today is 2008. If they
3 have interviewed people in 2003, 2002, 2001, who said
4 those things, that's exculpatory, and they have an
5 obligation to give it to us.

6 So we just see the definition of exculpatory
7 here very differently. And we believe that the law
8 supports our use of that type of information at trial.
9 It is material to the defense.

10 And to the extent that they have interviewed a
11 bunch of people who have said those things, they need to
12 give it to us. To the extent that they have on the
13 computers their forensic information, they have some
14 e-mail traffic that goes between Mr. Sedaghaty and
15 Mr. Wilcox, we're entitled to it. And it's not enough
16 for them to say, "well, you have the machine yourself
17 and you can go find it." I don't know if forensically
18 I'm going to be able to.

19 THE COURT: You've been through it.

20 MR. CARDANI: We've turned over a lot of this
21 stuff. Some of the things Mr. Wax says, we agree would
22 be exculpatory. If there are witness reports saying
23 that Mr. Sedaghaty was raising money for the refugees in
24 Chechnya, that would be exculpatory and would be turned
25 over. And, in fact, some of that material has. But

1 it's -- that's a far cry from "he is generally a man of
2 peace." "He promotes issues of peace." "I've known
3 Pete for years, and, you know, he's all about peace."
4 That's not exculpatory in the sense --

5 THE COURT: I get the issue. I'll look at the
6 paperwork and give you something.

7 MR. CARDANI: Judge, a few other things. On
8 the computers, just to be clear, a lot of the material
9 in the computers had, as I understand it talking to the
10 agents who aren't able to be here today, the drives were
11 wiped. Somebody went through them and erased a series
12 of material. So a lot of effort has been put into kind
13 of reconstructing this. And a lot of dialogue has been
14 occurring between the experts we're using and the
15 experts they are using. We're telling them about what
16 we're doing to get into this. And what we're doing is
17 we use search terms. When you have a bunch of material
18 on a computer -- and I'm not real steeped in this like
19 my colleagues, some of my colleagues are, you can do
20 search terms. Put in "Chechnya" and look for anything
21 that may be wiped out on the computer relating to
22 "Chechnya." And then look at it for what it will.

23 So I'm hesitant to go too far in saying where
24 we're at because there's been an awful lot of dialogue,
25 continuing dialogue, meaningful dialogue, as I

1 understand it, between their investigators and the
2 people we're using on how to get information out of
3 these computers. But, you know, we can only go so far
4 in trying to do their work.

5 If something comes across that's exculpatory
6 and it's Chechnyan related, we're going to dig it out
7 and we're going to give it to them. So we get it in
8 terms of what's exculpatory vis-a-vis the four corners
9 of the indictment.

10 On witness statements, if it's related to a
11 defense we think is coming, if it's related to the
12 indictment itself, they are going to get it. But just
13 general, every person we've ever talked to about
14 Mr. Seda, any report about Mr. Seda in any government
15 agency's possession, it just goes far beyond anything
16 we're required to do.

17 THE COURT: Okay. Are there other subjects we
18 need to talk about today?

19 MR. WAX: One more, please, and it's again
20 another computer issue. At the time that Summer Rife
21 came into the country, she was in possession of a laptop
22 computer. That laptop was seized. It was mirrored.
23 The government provided us a -- what seemed to be
24 relatively short list of material on that computer.
25 There were a number of redactions in the list that they

1 gave us. And we believe that the same issue exists with
2 respect to their efforts to recover material from that
3 laptop, and their provision of only a very small part of
4 that. We do not have a mirror image of that laptop.
5 Yes, Ms. Rife got the laptop itself back. But by the
6 time we got into the case and were in a position to try
7 to do something, whatever it was that the government had
8 had to mirror no longer existed because the machine had
9 been used. So that we are not in a position to use that
10 laptop to try to do a recreation of our own because it
11 was used between the time that the government mirrored
12 it and the time that we were in any position to deal
13 with it.

14 THE COURT: What would that do besides put more
15 information on it, on the hard drive?

16 MR. MATASAR: It would cover up the
17 information. It makes it harder to recover if
18 somebody --

19 THE COURT: What was the period of time?

20 MR. MATASAR: -- uses the --

21 MR. WAX: I don't know precisely, Judge. And
22 if they have a copy, that -- you know, a mirror that
23 they can give us, we can get a mirror from -- of that
24 and try to do our --

25 THE COURT: How long did the government have

1 the computer?

2 MR. WAX: I don't know.

3 MR. CARDANI: Judge, my understanding is when
4 she came into the United States last year, it was an
5 ICE, Customs took it, mirrored it, and within a matter
6 of time, gave it back to her.

7 THE COURT: Matter of time? Twenty minutes?
8 Twenty days?

9 MR. CARDANI: Ms. Rife is here. We can ask
10 her. I think it was a matter of weeks.

11 THE COURT: You ought to know that.

12 MR. WAX: We'll find out. But the relevant
13 time would not be how long the government had it. I
14 mean, that is one relevant factor. Another relevant
15 factor is, by the time that we were in a position to try
16 to do something with it, she had used it, it had been
17 used. And as Mr. Matasar indicated, that adding stuff
18 to it makes the recovery process of whatever existed
19 then more difficult because some of it wouldn't be there
20 anymore.

21 THE COURT: I understand your issues. Any
22 others?

23 Mr. Baker, do you need a couple of minutes with
24 me before these people go?

25 MR. BAKER: Yeah.

1 THE COURT: All right. Short recess.

2 (Discussion held off the record.)

3 THE COURT: Counsel, a couple of additional
4 thoughts. Mr. Cardani, are you taking the position that
5 you shouldn't have to turn over -- it's been referred to
6 as a mirror, I've never used that term -- of that last
7 computer?

8 MR. CARDANI: The Rife? No, we're not taking
9 that position. We just talked privately.

10 THE COURT: Then work it out.

11 MR. CARDANI: We'll work that out.

12 THE COURT: That didn't sound like a real
13 dispute to me. I was back there scratching my head,
14 what's going on here?

15 MR. CARDANI: Judge, there are attorney-client
16 documents on that computer, all right? So we have
17 stayed away from those computers. A report was printed
18 out. We've turned it over to the defense in redacted
19 form because it was redacted from us, too. We'll figure
20 this thing out.

21 THE COURT: What I have learned through hearsay
22 is that Judge Rosen in Detroit in the Fawzi Assi case
23 proposed something similar to what I've proposed with
24 regard to ex parte filing by a defendant, that it may or
25 may not have been filed, the case may have been resolved

1 before that happened. If such a -- if I authorize --
2 Mr. Matasar, I think I was talking to you at the time.
3 If I authorize such an ex parte submittal, I want it
4 prepared on a secured computer, the court security
5 computer.

6 MR. MATASAR: Your Honor, this is the document
7 that we talked about that would assist you in reviewing
8 the material the government has already --

9 THE COURT: Yes. The reason I want it prepared
10 on a court security computer is that just in making
11 reference to theories and so on, it could tend to
12 disclose something that shouldn't be out there in the
13 general computerland. All right?

14 MR. MATASAR: Yes.

15 THE COURT: Okay.

16 MR. CARDANI: Judge, would that document be
17 submitted through Ms. Hogarty?

18 THE COURT: Yes, her computer, to make it real
19 clear.

20 MR. WAX: And would that computer be available
21 to us here in Oregon?

22 MS. HOGARTY: Yes.

23 THE COURT: Well, you can negotiate that.
24 We'll make sure it happens in ways that are appropriate.

25 All right. Anything further at this time?

1 Thank you very much.

2 MR. CARDANI: Thank you, Judge.

3 MR. MATASAR: Thank you very much, Your Honor.

4 MR. WAX: Thank you.

5 (The proceedings were concluded at 1:27 p.m.)

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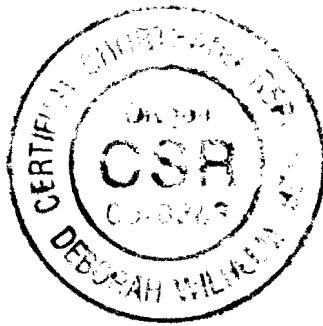
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1 CERTIFICATE

2 I, Deborah Wilhelm, Certified Shorthand Reporter
3 for the State of Oregon, do hereby certify that I was
4 present at and reported in machine shorthand the oral
5 proceedings had in the above-entitled matter. I hereby
6 certify that the foregoing is a true and correct
7 transcript, to the best of my skill and ability, dated
8 this 30th day of June, 2009.



Deborah Wilhelm
12 Deborah Wilhelm, RPR
13 Certified Shorthand Reporter
14 Certificate No. 00-0363